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*Dewsnup v. Timm*¹: Judicial Sleight of Hand in Statutory Construction of the Bankruptcy Code

I. INTRODUCTION

United States Law Week hailed *Dewsnup v. Timm*² as "the most complicated issue of statutory construction in this term's bankruptcy crop."³ The Court used this case to settle a debate over contradictory attempts among the circuits to interpret sections 506(a) and 506(d) of the Bankruptcy Code.⁴ The interpretive attempts applied to a Chapter 7 debtor's ability to "strip down" a creditor's lien on real property to the current value of the property. This casenote first outlines the background leading to different statutory interpretations among the circuits and the facts of *Dewsnup* chosen by the Court to settle the debate. This note then outlines the proceedings of *Dewsnup* from the bankruptcy court to the Supreme Court. This note then proceeds to examine the reasoning of the Court's three-part test used in arriving at the *Dewsnup* decision and explains how the Court's reasoning departs from previous practice. Finally, this note suggests a more specific application of the above three-part test to *Dewsnup* using the reasoning of a previous bankruptcy case.

II. BACKGROUND

There has been a considerable difference in opinion dividing the circuits regarding the relationship between sections 506(a) and 506(d) of the Bankruptcy Code.⁵ The dis-

1. 112 S. Ct. 773 (1992).

2. *Id.*

3. 61 U.S.L.W. 3067, 3072 (U.S. Aug. 11, 1992).

4. 11 U.S.C. § 506(a), (d) (1988).

5. 11 U.S.C. § 506 (1988), reads in full:

(a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim.

pute revolved around the rights of the debtor and creditor when a lien is undersecured. The Court granted certiorari in *Dewsnup* to settle that dispute. In doing so, the Court recognized that the submissions of the parties and amici were model representatives of the issues involved in the interpretation of the relationship between sections 506(a) and 506(d).⁶ Because these issues go to ownership and credit, the basis of the secured transaction, they are very important to a society that operates on credit and values ownership rights in property. The issues involve the balance of competing interests. The first is the supposed "fresh start" offered a debtor in bankruptcy. The other is the interest of a creditor seeking her contractual due when a debtor defaults. How society balances these interests affects the availability of consumer and commercial loans as well as the interest rates paid for these loans.

These issues are especially acute when, in a bankruptcy proceeding, the amount of a creditor's lien is above the current value of the property securing the lien. Sometimes, and for several possible reasons, a loan becomes undersecured; thus the collateral is worth less than the amount owed. Technically, this bifurcates the loan into secured and unsecured portions. Before *Dewsnup*, courts treated the undersecured lien differently, using either a "strip

Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

(b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

(c) The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim.

(d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void, unless—

(1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or

(2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

6. *Dewsnup v. Timm*, 112 S. Ct. at 776-77.

down" action or a *Dewsnup* approach. A "strip down" voids the unsecured portion of the lien, giving no relief to the creditor for that portion of the lien. A *Dewsnup* approach just affects the priority of distribution from the debtor's estate, maintaining both parts of the creditor's loan. The part equal to the value of the collateral is secured. The other portion is considered an unsecured claim, treated with all other general claims on the bankruptcy estate.

The circuit disagreement revolved around the issue of this "strip down." Stripping the portion of the creditor's lien above the current value of the property leaves no recourse available to the creditor, but does provide the debtor with incentive to redeem the property. *Gaglia v. First Federal Savings & Loan Association*⁷ illustrates this rule. This was considered the majority position.⁸ The fresh start doctrine in bankruptcy justified this rule.

Other courts formed a "strong minority"⁹ agreeing with the Tenth Circuit's decision in *In re Dewsnup*.¹⁰ These courts reasoned that the lien overage should not be stripped away. The creditor's lien is bifurcated into secured and unsecured portions. This allows the secured lienholder some solace as well as the benefit of pre-foreclosure sale increases in real property value. Both views came from interpretations of sections 506(a) and 506(d).

III. THE PROCEEDINGS

A. Case Facts

Petitioner Althea Dewsnup and her husband borrowed \$119,000 from the respondents. A Deed of Trust on two parcels of Utah farmland owned by the Dewsnups secured the loan. One year later, petitioner defaulted on the loan. Respondents issued a notice of default and began a foreclosure of the collateral property. Petitioner filed a Chapter 7 bankruptcy petition seeking liquidation, staying the foreclosure.

During the course of the bankruptcy proceedings, petitioner represented that the then owing debt (about \$120,000) exceeded the court-found fair market value of the

7. 889 F.2d 1304 (3d Cir. 1989).

8. *In re Dewsnup*, 908 F.2d 588, 589 (10th Cir. 1990).

9. *Id.*

10. *Id.*

land (\$39,000). The petitioner asked the court to apply the "strip down" approach and thus reduce the lien to \$39,000. The immediate benefits to the petitioner would be the removal of a sizeable claim against the estate and a greater motivation to redeem the property.

B. Procedural History

The Bankruptcy Court denied petitioner relief.¹¹ The United States District Court affirmed the Bankruptcy Court without an opinion.¹² The Court of Appeals for the Tenth Circuit also affirmed.¹³ The United States Supreme Court later granted certiorari.¹⁴

C. Supreme Court Holding

The Supreme Court held that a Chapter 7 debtor may not "strip down" a creditor's lien on real property to the judicially determined value of the collateral when that value is less than the amount of the claim secured by the lien.

IV. REASONING

A. Lower Courts' Reasoning

The Supreme Court touched only lightly on the rationales of the lower courts. The lower courts denied relief to the petitioner because the trustee abandoned the property. Abandonment means the property returns to the debtor and is no longer part nor concern of the estate. Therefore, section 506(a), and section 506(d) by implication, no longer applied because the property was no longer "property in which the estate has an interest."¹⁵ There is no specific indication why Justice Blackmun's majority opinion did not use this reasoning. Apparently this rationale would not allow the Supreme Court to get at the issue of statutory construction. Therefore, the Court undoubtedly embarked on an analysis allowing it to reach the statutory construction issue brewing just beyond the scope of the lower courts' holdings.

11. In re Dewsnap, 87 B.R. 676 (Bankr. D. Utah 1988).

12. Dewsnap v. Timm, 112 S. Ct. at 776 (citing App. to Pet. for Cert. 12a).

13. Dewsnap v. Timm, 908 F.2d 588 (10th Cir. 1990).

14. In re Dewsnap, 111 S. Ct. 949 (1991).

15. 11 U.S.C. § 506(a) (1988).

B. Positions of the Parties and Amici

Petitioner argued that sections 506(a) and 506(d) are complementary and should be read together.¹⁶ Petitioner reasoned that the plain language of the statute indicates a relationship between the security reducing provision of section 506(a)¹⁷ and the lien avoiding provision of section 506(d).¹⁸ If the two sections are complementary and related, it is easier to accept the idea that "allowed secured claim" means the same thing in both sections.

Petitioner's amicus argued the lien voiding language of section 506(d) is plain. When faced with a claim other than an allowed secured claim, the bankruptcy court must void it. Amicus further reasoned that the effect of the Tenth Circuit's decision would lead to evisceration of a debtor's right of redemption and that undersecured creditors would be unable to participate in the distribution of the assets of the estate.¹⁹

Respondents answered that sections 506(a) and 506(d) are not "rigidly tied" to each other.²⁰ They argued that 506(a) deals with classifying claims at the time of distribution. This interpretation relies on the closing language of 506(a). "Such value shall be determined in light of the . . . proposed disposition or use of such property . . ."²¹ But the lien voiding power of 506(d) is directed at the time

16. Petitioner explains:

Because, under section 506(a), a claim is secured only to the extent of the judicially determined value of the real property on which the lien is fixed, a debtor can void a lien on the property pursuant to section 506(d) to the extent the claim is no longer secured and thus is not 'an allowed secured claim.' In other words, section 506(a) bifurcates classes of claims allowed under section 502 into secured claims and unsecured claims; any portion of an allowed claim deemed to be unsecured under section 506(a) is not an 'allowed secured claim' within the lien-voiding scope of section 506(d).

Dewsnup v. Timm, 112 S. Ct. at 776-77.

17. *Supra* note 4. Since an "allowed claim" is divided into allowed secured and allowed unsecured portions when the claim is undersecured, petitioner urged that respondents would have an "allowed secured claim" only to the extent of the judicially determined value of the collateral.

18. *Supra* note 4. Petitioner argued the Court must void the unsecured portion of respondents' claim because it was not an "allowed secured claim" within the meaning of § 506(a).

19. *Id.* at 777.

20. *Id.* (quoting Brief for Respondents at 7).

21. 11 U.S.C. § 506(a) (1988).

when foreclosure takes place, referring to the exceptions to the voiding power, which in turn refer to occurrences at the start of bankruptcy.

Respondents and the United States as amicus curiae argued in the alternative that the words "allowed secured claim" in section 506(d) do not have to be read as an indivisible term of art defined by reference to section 506(a). Instead, respondents and amicus reasoned that each claim must be examined first as an allowed claim, and then as a secured claim. Respondents then concluded that since the claim in question is allowed under section 502 and is secured by a lien on underlying property, it does not fall within the lien voiding power of section 506(d). Section 506(d) voids only claims that are not allowed and not secured.

Lastly, respondents made two additional arguments. The first related to pre-Code bankruptcy law. Historically, liens like the one in question passed through bankruptcy preserved. Respondents argued that nothing in the Code's legislative history reflects an intent to alter the law. Therefore, the pre-Code standard controls. The second argument related to the policy that bankruptcy provides a fresh start to the debtor. One purpose served by the bankruptcy process is to relieve an insolvent party of excessive indebtedness. This is accomplished either by liquidation or by a reorganization allowing the party to make reasonable payments on his indebtedness. Respondents claimed such a policy cannot justify an impairment of respondents' property rights. This is because the fresh start policy does not extend to an in rem claim against property, only to a discharge of personal liability.

C. Reasoning of the High Court

The Court recited the various positions of the parties and amici in its opinion to prove "that section 506 of the Bankruptcy Code and its relationship to other provisions of that Code do embrace some ambiguities."²² This is the only proof the Court used to determine the facial ambiguity of sections 506(a) and 506(d).

22. *Id.*

In spite of the scarce position, it is this finding of ambiguity by the Court that decided the outcome by triggering a three-part test involving (1) ambiguity, (2) legislative history analysis and (3) pre-Code law analysis. Although the Court said it was inclined to agree with petitioner's argument that the words "allowed secured claim" should take on the same meaning in both subsections,²³ pre-Code law and the practical effect of petitioner's argument persuaded the Court to find for respondents, upon finding that sections 506(a) and 506(d) were ambiguous.²⁴ Thus, respondents won by default.

After deciding that the number of different arguments espoused in *Dewsnup* was the equivalent of a finding of ambiguity, the Court turned to the legislative history of the Bankruptcy Code. The Court found no significant language in the legislative history to warrant a change from the pre-Code law.²⁵ Thus, an examination of pre-Code law was in order. The Court determined that under the Bankruptcy Act of 1898, a lien on real property passed through bankruptcy unaffected. The Court cited several cases to support this proposition.²⁶ The Court put its findings together to deny petitioner's requested relief.²⁷ On this basis, the United

23. *Dewsnup v. Timm*, 112 S. Ct. at 778.

24. In interpreting the Bankruptcy Code, the Court does not do so with blinders on. This means previous related judicial and legislative action must be considered. In the absence of clear statutory text and in light of long-standing pre-Code practice, the Court will not presume to do the job of the legislature. The pre-Code law must be examined as well as the legislative history surrounding the drafting of the Code. If a particular interpretation contradicts pre-Code law, something in the legislative history must justify such an interpretation.

25. See H.R. REP. NO. 595, 95th Cong., 2d Sess. 357 (1977), reprinted in 1978 U.S.C.C.A.N. 5787.

26. See *Farrey v. Sanderfoot*, 111 S. Ct. 1825, 1829 (1991) ("Ordinarily, liens and other secured interests survive bankruptcy."); *Johnson v. Home State Bank*, 111 S. Ct. 2150, 2154 (1991) ("Rather, a bankruptcy discharge extinguishes only one mode of enforcing a claim—namely, an action against the debtor in personam—while leaving intact another—namely, an action against the debtor in rem."); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 579 (1935) ("No instance has been found, except under the Frazier-Lemke Act, of either a statute or decision compelling the mortgagee to relinquish the property to the mortgagor free of the lien unless the debt was paid in full."); *Long v. Bullard*, 117 U.S. 617 (1886) (holding that a discharge in bankruptcy does not release real estate of the debtor from the lien of a mortgage created by him before the bankruptcy).

27. The Court stated:

[G]iven the ambiguity here, to attribute to Congress the intention to grant a debtor the broad new remedy against allowed claims to the extent that they become 'unsecured' for the purposes of section 506(a) with-

States Supreme Court affirmed the judgement of the Tenth Circuit.

V. ANALYSIS

The *Dewsnup* Court used the historic form of looking at a statute using three steps. First, the Court asked whether the challenged words were plain or ambiguous. Second, the Court looked at these words in light of the legislative history of the Code. Third, the Court looked to the pre-Code law. This analysis will show that the Court used the correct form for general examination, but the examination lacked specific detail and substance.

A. First Step: A Finding of Ambiguity

As Justice Scalia²⁸ correctly observed in his dissent, the Court avoided a thorough use of the available analysis techniques. The *Dewsnup* Court disregarded an existing test used in the first step of statutory inquiry. Another Bankruptcy Code case decided recently involving section 506(b) outlined this test.²⁹ Sweeping aside contentions by the parties, the opinion in *Ron Pair* started "where all such inquiries must begin: with the language of the statute itself."³⁰ This is the best place to start with any legislative inquiry. The Court in *Ron Pair* unfolded a three-part method of inquiry. First, a "natural reading of the [relevant] phrase." Second, an examination of the "grammatical structure of the

out the new remedy's being mentioned somewhere in the Code itself or in the annals of Congress is not plausible . . . and is contrary to basic bankruptcy principles.

Dewsnup v. Timm, 112 S. Ct. at 779.

28. Two schools of thought dominate judicial interpretation of the law. One favors the establishment of clear rules, providing bright lines applicable to all cases in the field. One attribute of this is dependability. The other approach favors the balancing of interests. An attribute of this is fairness. Students of Constitutional law will note that Justice Scalia is well known for his advocacy of rule-based decisionmaking. It seems only fitting that Justice Scalia should be the one to dissent here. In *Dewsnup*, the Court appears to depart from a previous method of determination (rule basis) in a case standing as precedent in order to reach a conclusion it feels is correct. Justice Scalia points this out.

29. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235 (1989) (addressing the issue of whether non-consensual, over-secured creditors were entitled to post-petition interest).

30. *Id.* at 241.

statute." Third, a comparison with similar terms used throughout the Code."³¹

A bankruptcy litigator, not to mention the Courts of Appeal, will be confused by the method used in *Dewsnup*. In *Ron Pair* the Court clearly laid out the test for a finding of statutory ambiguity. The Court gave detail to its method. In *Dewsnup*, the Court, in substance, cast all that aside and made no inquiry on its own as to the ambiguity of sections 506(a) and 506(d). As pointed out previously in part IV.C., there is no evidence of an independent analysis. The Court was quick to find ambiguity. This is important to understand since the Court can generally only get at statutory interpretation if the language is ambiguous. If a statute's language is plain, "the sole function of the courts is to enforce it according to its terms."³² It leaves the litigator and circuit court justice wondering what method will be used by the Court when next called on to interpret a statute. It is unclear whether plainness or ambiguity is decided by an independent test or by the mood and structure of the Court on appeal. This makes adequate representation, preparation and judicial finding most difficult.

Instead of listing the various positions of the parties and amici as evidence of statutory ambiguity, the Court should have made its own inquiry. Just because parties disagree as to the meaning of a statute does not mean the statute is ambiguous. A party's personal agenda, either consciously or subconsciously, affects statutory reading. A neutral party may find it plain and clear through independent analysis after a presentation by advocates in our adversarial system. The Court should have embarked on a reading of both subsections, studied their grammatical structure and examined use of similar terminology throughout the Code.

31. *Id.* at 241, 242 n.5.

32. *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

1. Applying the three-part Ron Pair Standard

a. A "natural reading" of the statute. Section 506(a) has several pertinent terms. They include "allowed claim," "secured claim" and "unsecured claim." The section clearly differentiates between an allowed secured claim and an allowed unsecured claim. The former exists "to the extent of the value of such creditor's interest in the estate's interest in such property"³³ In other words, an allowed secured claim exists when the creditor's interest is less than or equal to the value the property has to the estate. The latter exists "to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim."³⁴ "Such creditor's interest" refers to the "secured claim" which is defined in section 506(a). Therefore, that portion of the creditor's allowed claim that is greater than the secured claim is an "allowed unsecured claim."

Using the facts of *Dewsnup*, this means that the lien was an allowed claim. The judicially determined value of the property was \$39,000.³⁵ This is the value the property had to the estate. Thus, \$39,000 of respondents' lien represented an allowed secured claim and \$81,000³⁶ represented an allowed unsecured claim, both defined by section 506(a).

While subsection (a) of section 506 carefully defines "allowed secured claim" and "allowed unsecured claim," subsection (d) confuses the statute's meaning by using the term "allowed secured claim" negatively: "a claim . . . that is *not* an allowed secured claim"³⁷ A claim "that is not an allowed secured claim" could be either a disallowed claim or an allowed unsecured claim. Two things lead the reader to choose allowed unsecured claim as the better choice. First, section 506(a) makes reference to allowed unsecured claims but not to disallowed claims. Second, since section 506(d) uses the specific term "disallowed claim" elsewhere, it leads the reader to think the two are separate terms. Therefore, a

33. 11 U.S.C. § 506(a) (1988), *supra* note 4.

34. 11 U.S.C. § 506(d) (1988), *supra* note 4.

35. *Dewsnup v. Timm*, 112 S. Ct. at 776.

36. *Id.* The amount owing on the lien was \$120,000. Subtract the \$39,000 allowed secured claim and that leaves \$81,000 as the allowed unsecured claim.

37. 11 U.S.C. § 506(d) (1988) (emphasis added), *supra* note 4.

natural reading of section 506(d) leads the reader to infer "a claim . . . that is not an allowed secured claim . . .," refers to an allowed unsecured claim. This suggests that a lien securing an allowed unsecured claim is void. In *Dewsnup*, this means the \$81,000 portion of the lien is void.

b. The grammatical structure. A study of the grammatical structure is a look at the use of punctuation, conjunctive words and modifiers within the statute.³⁸ Writings (like statutes) that attempt to cover many possibilities are often fraught with veritable mazes of phrases set aside by commas. Many times terms and modifiers are hopelessly set apart this way. By a careful mapping of the phrases the reader can clear away potential ambiguities. Fortunately, the sections pertinent to this analysis are clear.

The focus here is on the term "allowed secured claim" as used in section 506(d). The emphasis is here because the Court adopted respondents' position that the words are not an indivisible term of art.³⁹ The pertinent part of section 506(d) reads: "To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void,"⁴⁰ There is no comma between "allowed" and "secured," nor is there any word between the two indicating a break in the term (i.e., "allowed or secured claim"). Grammatically, the words "allowed secured claim" are an indivisible term. Therefore, a lien securing a claim that is not both an allowed and a secured claim is void under section 506(d).

c. Use of the terminology throughout the Code. Under this prong, consistent term usage throughout the Code is sought.⁴¹ Since Congress chose the vague language of a "claim . . . that is not an allowed secured claim . . ." rather

38. United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241-42 (1989).

39. Dewsnup v. Timm, 112 S. Ct. at 778.

40. 11 U.S.C. § 506(d) (1988).

41. The Court has often invoked the "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." Sullivan v. Stroop, 110 S. Ct. 2499, 2504 (1990) (quoting Sorenson v. Secretary of Treasury, 475 U.S. 851, 860 (1986) (quoting Helvering v. Stockholms Enskilda Bank, 293 U.S. 84, 87 (1934) (quoting Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 433 (1932))).

than one of the two specific possibilities, it is a natural assumption that Congress intended both terms to be usable in the context of the section 506(d) voiding power. As Justice Scalia pointed out in his dissent, the Bankruptcy Code is consistent in its use of the phrase "allowed unsecured claim" to describe that portion of the claim treated as unsecured as under section 506(a).⁴² Similarly, the Code is consistent in its use of the term "disallowed claim."⁴³ Since the Code consistently uses both "allowed unsecured claim" and "disallowed claim" where applicable, the use of a more encompassing term is not ambiguous. Either type of claim is subject to the lien voiding power.

B. The Second Step: Relevant Legislative History

"[W]here the language is unambiguous, silence in the legislative history cannot be controlling."⁴⁴ This quotation plainly states that once the above analysis has reached the conclusion that sections 506(a) and 506(d) are plain, the analysis stops and the plain meaning controls. As stated earlier, this is true usually, but a noticeable exception exists. "The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'"⁴⁵

The most interesting part of the Court's legislative history analysis is not the history itself. Instead it is the Court's radical change of attitude from 1989 to 1992, about what the history means. The Court found no particular language in the history to support or refute petitioner's claims. The Court then detailed a historical line of cases

42. See, e.g., 11 U.S.C. § 507(a)(7) (1988) (fixing priority of "allowed unsecured claims of governmental units"); § 726(a)(2) (providing for payment of "allowed unsecured claim[s]" in Chapter 7 liquidation); § 1225(a)(4) (setting standard for treatment of "allowed unsecured claim[s]" in Chapter 12 plan); § 1325(a)(4) (setting standard for treatment of "allowed unsecured claim[s]" in Chapter 13 plan).

43. See, e.g., 11 U.S.C. § 303 (1988) (stating, if "claim . . . is disallowed" involuntary bankruptcy can continue); § 522 (bad faith adversarial proceeding by creditor can result in "claim being disallowed"); § 723 (grounds for disallowing claims of partnership creditors); § 1126 (creditor whose claim is disallowed is not entitled to vote on Chapter 11 plan); § 1328 ("specifically discharges claims that are not allowed").

44. *Dewsnup v. Timm*, 112 S. Ct. at 779.

45. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)).

holding that a lien survives bankruptcy intact.⁴⁶ The opinion then stated "Congress must have enacted the Code with a full understanding of this practice."⁴⁷ Furthermore, the Court stated, "When Congress amends the bankruptcy laws, it does not write 'on a clean slate.'"⁴⁸ Putting these factors together, the Court put quite a bit of emphasis on pre-Code law.

When faced with the same type of decision in the *Ron Pair* case the Court had a completely different approach.

Initially, it is worth recalling that Congress worked on the formulation of the Code for nearly a decade. It was intended to modernize the bankruptcy laws, and as a result made significant changes in both the substantive and procedural laws of bankruptcy. In particular, Congress intended "significant changes from current law in . . . the treatment of secured creditors and secured claims." In such a substantial overhaul of the system, it is not appropriate or realistic to expect Congress to have explained with particularity each step it took. Rather, as long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute.⁴⁹

The finding by the *Dewsnup* Court that "Congress must have enacted the Code with a full understanding of this practice [of lien survival]"⁵⁰ does not equate with a finding that the plain reading of sections 506(a) and 506(d) produces "a result demonstrably at odds with the intentions of its drafters."⁵¹ Therefore, by the Court's own admission in *Ron Pair*, the plain reading controls.

C. The Third Step: Pre-Code Law

Justice Blackmun's opinion does, as previously stated, provide a fine showing of the state of the pre-Code law in

46. *Supra* note 25 (referring to *Dewsnup v. Timm*, 112 S. Ct. at 779).

47. *Dewsnup*, 112 S. Ct. at 779.

48. *Id.* (quoting *Emil v. Hanley*, 318 U.S. 515, 521 (1943)).

49. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240-41 (1989) (citations omitted).

50. *Dewsnup*, 112 S. Ct. at 779.

51. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)).

the area of lien survival through bankruptcy.⁵² However, the pre-Code law is of little consequence in light of the analysis in parts V.A.1.-V.B. concerning the natural reading of sections 506(a) and 506(d) and the lack of finding that the plain reading is at odds with the drafters intent.

D. Policy Considerations

Policy-wise, the Court pointed out that the practical effect of petitioner's argument would be to freeze the creditor's secured interest at the value found in the court proceeding. Time will pass between the date of such determination and the date of the sale and the property value could increase in the interim. However, the creditor would be unable to collect more than the judicially approved value. The excess would go to the debtor as a "windfall." A perfected secured creditor then could not rely on the safety his status purports to give. No loan could truly be considered safe from a "strip down." Among other things, this increased risk would lead to higher mortgage interest rates. This may have weighted the Court's analysis. However, there is no provision for these considerations in the three-part test set out and used.

VI. CONCLUSION

The Court's application of the statutory construction of sections 506(a) and 506(d) of the Bankruptcy Code is essentially form without substance. Statutory construction involves three steps. First, a court must find whether a statute is plain or ambiguous on its face. Second, a court looks to legislative history to find the intent of the drafters. Third, a court looks to the pre-Code law. Clearly the emphasis is on the first step. If the statute is plain on its face, it is only construed otherwise if it produces "a result demonstrably at odds with the intentions of its drafters."⁵³ That is a high hurdle to get over. If the statute is facially ambiguous, a court examines it in light of both legislative intent and pre-Code law. Lacking clear legislative intent, the pre-Code practice controls.

52. *Dewsnup v. Timm*, 112 S. Ct. at 778-79.

53. *Supra* note 44.

The *Dewsnup* Court apparently started the process with a policy oriented result in mind. The process was not objectively undertaken. The analysis lacked depth. The Court glossed over the plain versus ambiguous analysis. The Court also acted inconsistently with precedent in interpreting the state of legislative history. This allowed the Court to give unnecessary weight to the pre-Code law in order to invalidate the mortgage "strip down."

Had the Court undertaken a more thorough and neutral analysis, the plainness of the statutory language would have been clear. Use of the more thorough analysis opens the door to a different result, one which eliminates the policy consideration guesswork for practitioners and fact finders.

A.W. Bailey III